84-471

No. _____

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In The Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, a California Corporation, MITCHELL POMERANTZ, MAUREEN SOUCY, BERT HAYNER, on behalf of themselves and all others similarly situated,

PETITIONERS,

vs.

COUNTY OF LOS ANGELES, RAYMOND ARCE, WILLIAM A. GOODMAN, JUDD HOLZENDORF and BENJAMIN VARGAS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals denied Petitioners due process of law guaranteed by the Fifth Amendment to the United States Constitution when it denied Petitioners the right to orally argue their appeal, which presented substantial questions of broad public interest.

2. Whether Rule 3(a) of the Rules of United States Court of Appeals for the Ninth Circuit is, on its face and as construed and applied violative of the due process clause of the Fifth Amendment because it authorizes the Court of Appeals to deny oral argument to an appellant whenever it concludes, in its unfettered discretion, that "the decisional process would not be significantly aided by oral argument."

3. Whether the Court of Appeals erred when, in clear violation of its own Rule 3(a), it denied Petitioners the right to orally

rgue their appeal without notifying
etitioners that their appeal had been
lassified for submission without oral
rgument, and without affording Petitioners a
pportunity to file a statement setting forth
heir reasons why, in their opinion, oral
rgument should be heard.

PARTIES TO THE PROCEEDING

The caption reflects all interested parties. The National Federation of the Blind of California, a California corporation, has no parent, subsidiary, or affiliate.

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Petitioners National Federation Of The Blind Of California, a California corporation, Mitchell Pomerantz, Maureen Soucy and Bert Hayner, respectfully pray that the Court issue a writ of certiorarti to review the judgment and order of the United States Court of Appeals for the Ninth Circuit filed and entered February 10, 1984.

OPINIONS BELOW

This case was appealed twice to the Court of Appeals. The orders and opinions are set forth chronologically.

The District Court's order of December 13, 1979 granting defendants summary judgment on all issues is set forth as Appendix A (App., 1-2). The District Court's Findings of Fact and Conclusions of Law dated December 13, 1979 is unreported and is set forth as Appendix B (App., 3-9).

On February 5, 1980, the District Court entered its order denying petitioners' motion

for partial summary judgment (Appendix C, App., 10-12); its order denying petitioners' motion for attorneys's fees (Appendix D, App, 13-14); its order re motion to amend findings and judgment (Appendix E, App., 15-16); and its amended findings of fact and conclusions of law (Appendix F, App., 17-22).

On April 19, 1982, the Court of Appeals rendered its first opinion, reported at 674 F.2d 1288 and set forth as Appendix G (App., 23-42).

Following the spreading of mandate and on March 3, 1983, the District Court filed its unreported memorandum decision dismissing the complaint (Appendix H, App., 43-68). On March 4, 1983, the court entered its order of dismissal (Appendix I, App. 69-70). On April 4, 1983, the court entered its order on motion to modify judgment (Appendix J, App., 71-74). On February 10, 1984 the Court of Appeals

dismissed petitioners' appeal as moot (Appendix K, App., 75).

JURISDICTION

On May 14, 1984, the Court of Appeals denied petitioners' duly filed petition for rehearing (Appendix L, App., 76-77). Justice Rehnquist extended until September 24, 1984, the time within which to file this petition. The Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The provisions of Rule 34(a) of the Federal Rules of Appellate Practice, Rule 3(a) of the Ninth Circuit Rules, and the relevant provisions of the Fifth Amendment to the United States Constitution are set forth as Appendix M (App., 78-80).

STATEMENT OF THE CASE

Petitioners seek review by this Court of a judgment and order of the Ninth Circuit,

made without affording petitioners the opportunity to orally argue their case. In open violation of Rule 34(a) FRAP, and of its own Rule 3(a), the Ninth Circuit did not provide petitioners with any opportunity to file a statement setting forth the reasons why, in their opinion, oral argument was required. Additionally, the Ninth Circuit did not articulate the reasons for its decision. The denial of oral argument, coupled with the absence of a written opinion, has resulted in the denial of a meaningful appeal to petitioners.

A. The First Round.

1. On August 16, 1977, petitioners, NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, and three blind individuals, suing as a class, filed suit in the District Court for the Central District of California, alleging that the Los Angeles County Jury Commissioner and his subordinates violated

petitioners federal constitutional and statutory rights by excluding all blind persons, including the individually named petitioners, from jury service solely because they are blind. The undisputed record reveals that prior to filing suit, the individual petitioners were duly called for jury service, and were rejected by the Jury Commissioner as not competent to serve as jurors, solely because they are blind. Alleging a violation of their federal statutory and constitutional rights, petitioners sought declaratory relief, injunctive relief, damages, and attorney's fees. After the complaint was filed California amended its law to permit blind persons to serve as jurors, effective January 1, 1978. Thereafter, on October 18, 1978, petitioners filed their second amended complaint seeking damages and injunctive relief. They dropped their claim for a

declaratory judgment, that demand having been met by the new legislation. (App., 26-27).

2. In August 1979, the parties filed cross-motions for summary judgment. Petitioners' motion sought only partial summary judgment on the issue of liability, alleging that the respondents' total exclusion of all blind persons from jury service violated petitioners' rights to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. Respondents alleged, inter alia, that the action for injunctive relief was moot and that damages could not be awarded to petitioners. On December 13, 1979, the District Court entered summary judgment on behalf of respondents on all issues (App., 1-2).

3. Petitioners appealed, and on April 19, 1982 the Court of Appeals rendered its

decision affirming in part, reversing in part, and remanding in part. (App., 23-42). The Court of Appeals remanded for reconsideration of the merits of petitioners' constitutional claim to determine if they are entitled to any injunctive relief, and to determine whether they are "prevailing parties," entitled to a fee award. (App., 42).

B. The Second Round.

4. On remand, the District Court again refused to consider the petitioners' constitutional claims, asserting that the case was moot. (App., 43-68). Petitioners duly appealed to the Court of Appeals. On February 10, 1984, the Court made the following Order:

> Upon due consideration, this case is dismissed as moot for the reasons stated in the Memorandum Disposition of Judge A. Wallace Tashima, dated March 3, 1983. (App., 75)

This Order was made without giving petitioners an opportunity to argue their appeal. In disposing of petitioners' appeal without oral argument the court failed to comply with the requirements of Rule 34(a) FRAP, and failed to comply with its own Rule 3(a) which provides that when a case has been classified by the court for submission without oral argument, the clerk shall give the parties notice in writing of such action, and the parties shall have seven days in which to file a statement setting forth the reasons why oral argument should be heard. In the case at bar petitioners received no notice that their case was to be decided without oral argument. Petitioners filed a timely petition for rehearing and suggestion for rehearing en banc asserting that the Court of Appeals had denied them due process of law in violation of the Fifth Amendment, and had denied them rights

secured by Rule 34(a) FRAP, and Rule 3(a) of the Ninth Circuit Rules. The petition for rehearing was denied (App., 76-77).

REASONS FOR GRANTING THE WRIT

1. An important question presented by this case is the extent to which the due process of law, as guaranteed by the Fifth Amendment, and Rule 34(a) of the Federal Rules of Appellate Practice require courts of appeals to accord the right of oral argument to an appellant presenting substantial questions. In this case the Court of Appeals not only failed to afford Petitioners an opportunity to state why oral argument should be afforded, it also failed to state why it denied Petitioners oral argument.

It is Petitioners' basic position that a party presenting a substantial question has a constitutional right to oral argument, and that Rule 34(a) FRAP, and Ninth Circuit Rule 3(a) properly construed, require that oral

argument be allowed in all cases presenting a substantial question.

The Rules provide that oral argument will be allowed unless the appeal is frivolous, or the dispositive issue or set of issues has been recently authoritatively decided, or the facts and legal arguments are adequately presented in the briefs and records and the decisional process would not be significantly aided by oral argument.

Rule 34(a) was extensively revised in 1979. One of the purposes of the revision was to secure to appellants presenting substantial questions, the opportunity to argue their case orally. The Committee Note accompanying the amendment of the Rule states that the proposed amendment was patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change,

1975 (hereinafter "Report"), created by Public Law 489 of the 92nd Cong. 2nd Sess., 86 Stat 807. That Report emphasized the importance of both oral argument and written opinion, noting that judges, including Justices of this Court as well as attorneys, place a very high value on oral argument. Report 48.

An impressive 90% of the attorneys questioned by the Commission asserted that judges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case. A large majority of the attorneys believed oral argument to be essential in cases involving matters of great public interest, and also in cases involving the constitutionality of a statute. Report, 47. The Commission found oral argument to be an essential part of the appellate process, saying:

> "It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged with deciding it." Report, 48.

The Commission concluded that there was a need for a rule, setting a minimum national standard, "one phrased in terms sufficiently specific to be effective in assuring the availability in fact of oral argument in all appropriate cases." The Commission found it inappropriate to ignore the risks to the process of appellate adjudication inherent in too ready a denial of the opportunity orally to present a litigant's cause. Report, 48.

Petitioners submit that Rule 34(a) FRAP, and Ninth Circuit Rule 3(a) properly understood, afford an appellant a right to present oral argument, unless the appeal does not present a substantial question. The first

two criteria of the Rules support petitioner's interpretation. An appeal that is frivolous is plainly not substantial. Similarly if the dispositive issue or set of issues have been recently authoritatively decided, the question is no longer substantial. The third criterion clearly raises a problem, since it purports to permit a court of appeals to dispense with oral argument whenever it concludes "the decisional process would not be significantly aided by oral argument." On its face, the breadth of this language would swallow the first two criteria, and give the court unbridled discretion to deny oral argument at will.

The careful report upon which Rule 34(a) FRAP, was patterned clearly was not intended to give the courts of appeals such unfettered discretion. Moreoever, unless the third criterion is narrowly interpreted by this Court, it is unconstitutionally vague and

broad. See, generally Schuttleworth v. Birmingham, 394 US 147 (1969); See also Judge Mikva's dissent in United States v. Glover, 731 F.2d 41 (D.C. Cir. 1984). Glover dealt with a summary affirmance, without oral argument. The standard used was whether the "merits of [the] claim are so clear as to justify expedited treatment." Judge Mikva condemned this standard as "broad beyond defense," stating that it gives no clue as to how the "clearness" is to be divined, and gives no guidance as to the extent to which the motions panel should explore the merits. Id. at 53.

Judge Mikva also challenged the summary affirmance procedure because it authorizes reaching the merits of a case without oral argument. This he said

> "runs counter to the concerns that have been expressed by the diminution of oral argument in the appellate process. Among those who recently have described this movement away from oral advocacy is

> Justice Rehnquist, who observed that 'the intangible value of oral argument is, to my mind, considerable.'" Id. at 52.

One of the troublesome aspects Judge Mikva found in the summary procedure is the elimination of the pluralism that is the benchmark of the appellate process. Id. at 51. See also Coffin, The Ways of A Judge (1980), p. 174. In this case petitioners were denied oral argument probably at the suggestion of a law clerk, and almost certainly without the careful analysis ordinarily afforded an appellant.

This Court has recognized that in some cases oral argument may be "constitutionally required." Federal Communications Com'n v. WJR, the Goodwill Sta., 337 US 265, 273-276 (1949). This is such a case because petitioners have raised substantial constitutional and statutory questions, involving the public interest. The impor-

tance of oral argument was explored in Moles v. Regents of University of Cal., 32 Cal.3d 867 (1982), where the Court held that under the California Constitution oral argument is always constitutionally mandated. See, Logan v. Zimmerman Bros., Co., 455 US 422 (1982)

In addition to denying Petitioners oral argument, the Court of Appeals also declined to give its reasons for deciding the case against Petitioners. Rather, it simply stated that it was of the view that the case was moot for the reasons stated in the memorandum disposition of the district judge dated March 3, 1983. (App., 75). After that memorandum was filed, petitioners made a timely motion under Rule 49(e) Fed. R. Civ. P., to alter or amend a portion of the memorandum decision, and the District Court filed a memorandum in response to this motion on March 31, 1983 (App., 71-74). The Court of

Appeals did not comment on this subsequent memorandum.

The importance of opinion writing is also discussed in the Report of the Commission on Revision of the Federal Court's Appellate System, supra. The Report states that the most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed, that the due process clause of the constitution should be held to require courts of appeals to write "at least brief statements of the reasons for their decisions." Report, 49.

The issues of law and fact in this case are substantial and the answers do not rest on the application of settled rules of law. The Court's failure to afford oral argument, and its consequent failure to explain its judgment

effectively denied petitioners a meaningful appeal.

Without oral argument, and without a written opinion explaining the result, a litigant cannot be certain that a court composed of three judges has engaged in the interchange which is the heart of collegial decision-making. Generally, judges conference before and after oral argument. These conferences, augmented by the oral argument, are where much of the judicial process takes place. They provide judges an opportunity to discuss among themselves any difficulties they might have with the issues or analysis in a particular case.

It may be that a court of appeals may dispense with oral argument when an appeal is frivolous. When, however, substantial questions are raised, a meaningful appeal, consistent with the constitution and rules, requires oral argument and a written response

by the Court of Appeals.

2. Petitioners' appeal to the Court of Appeals raised substantial constitutional and statutory questions of great public importance. Petitioners filed their action claiming that the absolute exclusion of all blind persons from jury service denied them equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. See, Carter v. Jury Comm. of Greene Co., 396 U.S. 320 (1970). Petitioners also claimed that they were subjected to discrimination by a recipient of federal financial assistance, in violation of Section 504 of the Rehabilitation Act.

The primary question Petitioners presented in their second appeal to the Court of Appeals was whether the District Court erred in refusing to consider petitioners' constitutional claims after the Court of Appeals ordered it to do so. See App., 36, 42.

Petitioners also questioned the District Court's holding that the National Federation of the Blind had no standing to pursue the action, and the District Court's refusal to grant class certification, as requested by Petitioners, to avoid mootness. See generally, 3B Moore's Federal Practice and Procedure (2d Ed.) Section 23.04 [2] (1983); See also Milonas v. Williams, 691 F.2d 931, 936-927 (10th Cir. (1982)).

Additionally, Petitioners claim that their potential entitlement to attorneys' fees under 42 U.S.C. Section 1988 and 29 U.S.C. Section 794a(b) prevented the case from becoming moot. See Davis v. Village Park II Realty Co., 578 F.2d 461, 462 (2nd Cir. (1978)); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 338 (1980).

Finally, the reported decision of the Court of Appeals herein appears to be undermined by subsequent decisions, on issues

that were decided unfavorably to Petitioners. Thus, the Court of Appeals stated that it could see no reason to distinguish actions under 504 of the Rehabilitation Act from other civil rights actions for immunity purposes. (App., 32). In a more recent case however, the Ninth Circuit appears to have taken a contrary position. See, Scanlon v. Atascadero State Hospital, 735 F.2d 359 (9th Cir. 1984) The Court of Appeals also held in its reported decision herein that the County Jury Commissioner, and his subordinates enjoy quasi-judicial immunity, and are absolutely immune from a claim of money damages. (App., 30-31, 37). In Bothke v. Fluor Engineers and Constructors Inc., 713 F.2d 1405, 1410 n.3 (9th Cir. 1983), cert. granted, No. 83-1506, the court stated that absolute immunity had been afforded to the Jury Commissioner in the case at bar without discussing relevant

decisions of this Court. See also, Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982).

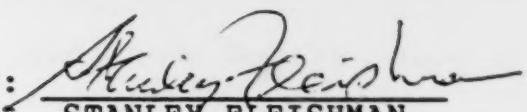
These important questions should be considered by the Court of Appeals after oral argument, and the results of the court's consideration should be set forth in a written opinion. In that way, and only in that way, can justice, and the appearance of justice, be satisfied.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
EVE TRIFFO

By: 
STANLEY FLEISHMAN
Attorneys for
Petitioners

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2049 Century Park East, Suite 3160, Los Angeles, California 90067.

On September 21, 1984, I served the foregoing document described as Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, California addressed as follows:

Gordon W. Trask, Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Executed on September 21, 1984, at Los Angeles, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Vicki S. Butler

VICKI S. BUTLER

APPENDIX A.

SUMMARY JUDGMENT

United States District Court

Central District of California

Mitchell Pomerantz, et. al., Plaintiffs, v. William A. Goodwin, etc., et al., Defendants. No. CV 77-3085-F.

Filed: December 12, 1979

Entered: December 13, 1979

This cause having come on regularly for hearing on September 17, 1979 on defendants' motion for summary judgment and plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having considered the pleadings and documents filed in the cause and the argument of counsel, and having found that there is no genuine issue of fact, and having concluded that defendants are entitled to a summary judgment on all issues, and having

made its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment is granted and judgment is entered for defendants and against plaintiffs on all issues.

IT IS FURTHER ORDERED that the clerk serve copies of this summary judgment by United States mail upon counsel for the parties appearing in this action.

Dated this 12th day of December, 1979.

/s/ Warren J. Ferguson

WARREN J. FERGUSON

United States District Judge

APPENDIX B.

FINDINGS OF FACT

AND CONCLUSIONS OF LAW

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. William A. Goodwin, etc., et al., Defendants. No. CV 77-3085-F.

Filed: December 12, 1979

Entered: December 13, 1979

The defendants' motion for summary judgment made on behalf of all defendants came on regularly for hearing before the above-entitled court, the Honorable Warren J. Ferguson, Judge Presiding, on September 19, 1979. The court, having heard and considered the argument of counsel and having read and considered the pleadings and papers filed in this action, makes the following findings of fact and conclusions of law:

/////

FINDINGS OF FACT

1. Defendants William A. Goodwin, Raymond Arce, Judd L. Holtzendorff, and Ben Vargas are respectively the former jury commissioner, the director of juror services, assistant director of juror services, and the former jury qualifications supervisor in the office of the jury commissioner of the County of Los Angeles.

2. The defendants named in (1) above and each of them at all times believed, and had reasonable grounds to believe, that blind persons were incompetent to serve as trial jurors under the California statutes prior to the effective date of Chapter 591 of the Statutes of 1977.

3. The defendants named in (1) above and each of them, and specifically in their actions in selecting and qualifying trial jurors, were subject to the ultimate control and direction of the judges of the superior

Court of the State of California for the County of Los Angeles.

4. The defendants named in (1) above and each of them at all times believed, and had reasonable grounds to believe, that the judges of the Superior Court were aware of the policy and practice of the jury commissioner pursuant to his interpretation of California statutes in disqualifying all blind persons for service as a trial juror and that such judges approved of such policy and practice.

5. In selecting and qualifying prospective trial jurors, the defendants named in (1) above exercised the same degree and type of discretion as that exercised by the judges in ultimately approving the jury panel, though in a subordinate capacity as staff for the Superior Court.

6. The defendants named in (1) above and each of them, in all actions complained of

in this action, acted in good faith and in the execution of a state law.

7. As of January 1, 1978, blind persons were competent to serve as trial jurors under California statutes. Defendants reviewed the qualifications of all prospective 1978 jurors for service on this basis that blindness is not a disqualification for service as a trial juror.

8. The County of Los Angeles and the Board of Supervisors thereof, individually and collectively, have no role in the selection of trial jurors and did not act or omit to act with respect to plaintiffs.

9. There are no genuine issues of fact in this action.

10. Should any of the foregoing findings of fact be more properly classified as a conclusion of law, then the court determines that such finding is and shall be a conclusion of law of this court.

CONCLUSIONS OF LAW

1. Defendants Goodwin, Arce, Holtzendorff and Vargas, and each of them, acted in good faith and in the execution of a statute in all acts complained of and are immune from damages in this action.

2. The blind are not a "suspect class" for purposes of equal protection analysis with respect to juror selection.

3. The right, privilege, or duty of a person to serve as a juror is not a "fundamental right" requiring strict scrutiny in equal protection analysis.

4. The claims for injunctive and declaratory relief are moot because the California law challenged has been changed to permit blind persons to serve as jurors effective January 1, 1978 and the defendants have demonstrated complete willingness to apply the change in California law. To the extent that plaintiffs seek to have

previously disqualified blind persons immediately made available for jury duty, this court cannot grant such relief because it would jeopardize the rights of litigants to a randomly selected jury.

5. The disqualification of blind persons as trial jurors prior to January 1, 1978 was not a result of any policy or conduct of the Couty of Los Angeles or the Board of Supervisors thereof individually or collectively and makes out no claim as to them.

6. Should any of the foregoing conclusions of law be more properly classified as a finding of fact, then this court determines that such conclusion is and shall be a finding of fact of this court.

IT IS FURTHER ORDERED that the clerk serve copies of these findings of fact and conclusions of law by United States mail upon counsel for the parties appearing in this action.

Dated this 12th day of December, 1979.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District Judge

APPENDIX C.

Order Denying Plaintiffs' Motion for Partial Summary Judgment

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants No. CV 77-3085-F.

Filed: February 5, 1980.

Entered: February 6, 1980.

The motion of the plaintiffs filed December 27, 1979 for a partial summary judgment is denied.

The motion seeks to force the court to decide the issue of whether blind persons have a constitutional right to serve as jurors in the state courts of this nation.

The court has purposely avoided making a decision on that issue because the question need not be decided in this litigation. The

State of California, through legislation instituted long before this litigation began, has made the constitutional issue moot.

Plaintiffs assert, however, that the constitutional issue is not moot because if constitutional rights were violated they are entitled to at least attorney fees. the court has ruled that they are not entitled to attorney fees because the elimination of the blind disqualification was passed by the California legislature entirely independent of the litigation.

With regard to the section 504 cause of action, the court does not need to decide whether Congress has created a private cause of action, or if it does what administrative remedies need to be exhausted. The California legislature has rendered the matters in this litigation moot.

Furthermore, with regard to any claim for monetary damages, the Supreme Court has

stated in Southeastern Community College v. Davis, 47 U.S.L.W. 4689 (June 11, 1979), that there is no relief under the Act when there is no showing of animus against handicapped individuals. The record is clear in this case that the good faith defense which barred damages under section 1983 bars damages under section 504.

IT IS FURTHER ORDERED that the clerk serve copies of this order by United States mail upon counsel for the parties appearing in this action.

Dated this 5th day of February, 1980.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States Circuit Judge

APPENDIX D.

Order Denying Motion

for Attorney Fees

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants. No. CV 77-3085-F

Filed: February 5, 1980.

Entered: February 6, 1980.

The motion of the plaintiffs filed December 21, 1979 for attorney fees is denied.

The record of the passage of legislation by the State of California, which legislation began eight months prior to the filing of the complaint in this action, shows beyond doubt that the elimination of the blind disqualification resulted from forces entirely independent of the legislation.

IT IS FURTHER ORDERED that the clerk

serve copies of this order by United States mail upon counsel for the parties appearing in this action.

Dated this 5th day of February, 1980.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States Circuit Judge

APPENDIX E.

Order re Motion to Amend

Findings and Judgment

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants. No. CV 77-3085-F

Filed: February 5, 1980.

Entered: February 6, 1980.

The motion of the plaintiffs filed December 21, 1979 to amend the findings of fact and conclusions of law is granted in part and denied in part in accordance with the amended findings of fact and conclusions of law filed this date.

The motion to amend the judgment is denied.

IT IS FURTHER ORDERED that the clerk serve copies of this order by United States

mail upon counsel for the parties appearing in this action.

Dated this 5th day of February, 1980.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States Circuit Judge

(-TAB-)

APPENDIX F.

Amended Findings of Fact

and Conclusions of Law

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants. No. CV 77-3085-F.

Filed February 5, 1980.

The defendants' motion for summary judgment made on behalf of all defendants came on regularly for hearing before the above-entitled court, the Honorable Warren J. Ferguson, Judge presiding, on September 19, 1979. The court, having heard and considered the argument of counsel and having read and considered the pleadings and papers filed in this action, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendants William A. Goodwin, Raymond Arce, Judd L. Holtzendorff, and Ben Vargas are respectively the former jury commissioner, the director of juror services, assistant director of juror services, and the former jury qualifications supervisor in the office of the jury commissioner of the County of Los Angeles.

2. The defendants named in (1) above and each of them at all times believed, and had reasonable grounds to believe, that blind persons were incompetent to serve as trial jurors under the California statutes prior to the effective date of Chapter 591 of the Statutes of 1977.

3. The defendants named in (1) above and each of them, and specifically in their actions in selecting and qualifying trial jurors, were subject to the ultimate control and direction of the judges of the Superior

Court of the State of California for the County of Los Angeles.

4. The defendants named in (1) above and each of them at all times believed, and had reasonable grounds to believe, that the judges of the Superior Court were aware of the policy and practice of the jury commissioner pursuant to his interpretation of California statutes in disqualifying all blind persons for service as a trial juror and that such judges approved of such policy and practice.

5. In selecting and qualifying prospective trial jurors, the defendants named in (1) above exercised the same degree and type of discretion as that exercised by the judges in ultimately approving the jury panel, though in a subordinate capacity as staff for the Superior Court.

6. The defendants named in (1) above and each of them, in all actions complained of in this action, acted in good faith and in the

execution of a state law.

7. As of January 1, 1978, blind persons were competent to serve as trial jurors under California statutes. Defendants reviewed the qualifications of all prospective 1978 jurors for service on the basis that blindness is not a disqualification for service as a trial juror.

8. The County of Los Angeles and the Board of Supervisors thereof, individually and collectively, have no role in the selection of trial jurors and did not act or omit to act wth respect to plaintiffs.

9. There are no genuine issues of fact in this action.

10. Should any of the foregoing findings of fact be more properly classified as a conclusion of law, then the court determines that such finding is and shall be a conclusion of law of this court.

CONCLUSIONS OF LAW

1. Defendants Goodwin, Arce, Holtzendorff and Vargas, and each of them, acted in good faith and in the execution of a statute in all acts complained of and are immune from damages in this action.

2. The claims for injunctive and declaratory relief are moot because the California law challenged has been changed to permit blind persons to serve as jurors effective January 1, 1978 and the defendants have demonstrated complete willingness to apply the change in California law. To the extent that plaintiffs seek to have previously disqualified blind persons immediately made available for jury duty, this court cannot grant such relief because it would jeopardize the rights of litigants to a randomly selected jury.

3. The disqualification of blind persons as trial jurors prior to January 1,

1978 was not a result of any policy or conduct of the County of Los Angeles or the Board of Supervisors thereof individually or collectively and makes out no claim as to them.

4. Should any of the foregoing conclusions of law be more properly classified as a finding of fact, then this court determines that such conclusion is and shall be a finding of fact of this court.

IT IS FURTHER ORDERED that the clerk serve copies of these findings of fact and conclusions of law by United States mail upon counsel for the parties appearing in this action.

Dated this 5th day of February, 1980.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States Circuit Judge

APPENDIX G.

Opinion

United States Court of Appeals,

Ninth Circuit

Mitchell Pomerantz, et al., Plaintiffs-Appellants, v. County of Los Angeles, et al., Defendants-Appellees. No. 80-5203

Argued and Submitted Oct. 5, 1981.

Decided April 19, 1982.

Appeal from the United States District Court for the Central District of California.

Before GOODWIN, NELSON, and REINHARDT, Circuit Judges.

NELSON, Circuit Judge.

On August 16, 1977, appellants, three blind individuals and the National Federation of the Blind of California, filed suit in the

District Court for the Central District of California, seeking declaratory relief, an injunction, damages, and attorney's fees. The undisputed facts show that the Los Angeles County Jury Commissioner, and other employees directly involved in the jury selection process for the Superior Court for the County of Los Angeles had, prior to January 1, 1978, excluded all blind persons from jury service solely because they were blind. Appellants allege, however, that this exclusion was in violation of the due process and equal protection clauses of the fourteenth amendment.

Prior to the commencement of this suit, on January 17, 1977, S. B. 152 was introduced in the California State Senate. The bill specifically made the blind eligible for jury service after January 1, 1978. The bill was passed by the State Senate on June 6, 1977. On August 8, 1977, the State Assembly

Committee on Judiciary recommended the bill be passed. On September 6, 1977, about three weeks after this suit was filed, the Senate Bill was approved by the Governor. The following day, the bill was chaptered by the Secretary of State. Cal.Civ.Proc.Code sections 198, 199 (Deering 1981). On September 15, 1977, the Jury Commissioner ceased disqualifying the blind from jury lists to be used subsequent to January 1, 1978.

Before the new law amending Sections 198 and 199 of the California Code of Civil Procedure was passed, those sections said that in order to be competent to serve, a trial juror had to be "in possession of his natural faculties and of ordinary intelligence and not decrepit." Cal.Civ.Proc.Code sections 198, 199 (Deering 1972) (amended 1977). Although the state courts had never interpreted the statute to decide whether the blind were meant to be disqualified under it, those in charge

of jury selection had uniformly interpreted the law to exclude the blind from jury service.

After the change in law, jury questionnaires sent in 1977, for service in 1978, were reviewed. Respondents who had indicated they were blind were no longer disqualified. The fact of blindness, therefore, has not barred anyone from serving on a jury since January 1, 1978. There is no question that all appellees have always acted in good faith in these matters and with no animus towards the blind. They have always acted under the reasonable belief that they are carrying out the law and policy of the state and the Superior Court.

In their second amended complaint, filed February 18, 1978, appellants claimed damages under 42 U.S.C. section 1983 (1976) and 29 U.S.C. section 794 (Supp. II 1978). They dropped their demand that the blind no longer

be excluded systematically from jury service, that demand having been met by the new legislation. They also dropped their claim for declaratory relief, but still made numerous demands on appellees for which they sought an injunction. Specifically they demanded that the court order that the named appellants be placed immediately on a jury list, that the jury questionnaires be changed to make it clear that the blind are no longer excluded, that appellees refrain from making jury service for the blind contingent on a waiver of claims, that appellees not discourage the blind from serving and inform the public of a blind person's right to serve, and that appellees make all juror reading material available in braille.

On December 13, 1979, the district court entered summary judgment on behalf of appellees on all issues and denied all relief to appellants. In a separate order dated

February 5, 1980, the trial court denied appellants any award of attorney's fees. Appellees, however, have taken many of the actions demanded of them in appellants' second amended complaint. And although appellees have not arranged for immediate placement of appellants on a jury list, a blind person now has the same chance of serving as anyone else. This is demonstrated by the fact that one named appellant, Ms. Soucy, had already served on a jury as of January 28, 1980.

The trial court based its denial of equitable relief on two grounds: first, that the claims for injunctive and declaratory relief were moot except for the one demanding immediate placement on a jury list; and second that this last request "would jeopardize the rights of litigants to a randomly selected jury." In addition, on the issue of damages, the trial court found that the defendants, County of Los Angeles and Board of

Supervisors were not involved in the exclusion of blind jurors, and that all the other defendants acted in good faith and in the execution of a statute and are immune from damages under section 1983 and section 794.

We affirm the trial court's denial of damages, for reasons different, however, from those given below. We also affirm its holding on mootness. The district court's denial of an injunction for immediate placement on a jury list, however, is reversed and remanded for further consideration.

I. DAMAGES

The standard of review of a summary judgment is set forth in Gaines v. Haughton, 645 F.2d 761, 769 (9th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982):

> The test to be applied in reviewing the grant or denial of a summary judgment is proper only when there is no genuine issue of any material fact or when viewing

> the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law.

Under that standard, we cannot disturb the trial court's finding that neither the County nor the Board of Supervisors had any participation in the jury selection process. There is no genuine issue of fact as to that finding, even viewing the evidence in the light most favorable to appellants. No damages, therefore, can be awarded against these two appellees. Any damage recovery against the other appellees, those who were involved in the jury selection process, is barred by their quasi-judicial immunity. Burkes v. Callion, 433 F.2d 318, 319 (9th Cir. 1970), cert. denied, 403 U.S. 908, 81 S.Ct. 2217, 29 L.Ed.2d 685 (1971). The Burkes court concluded: "This circuit has repeatedly held that judges and other officers of government whose duties are related to the judicial

process are immune from liability for damages under section 1983 for conduct in the performance of their official duties." 433 F.2d at 319. The court then held that a court appointed psychiatrist was entitled to this quasi-judicial immunity.

There are other instances, in addition to Burkes, of officials less involved with the judicial process than jury administrators having been held entitled to this quasi-judicial immunity. For example, in Mills v. Small, 446 F.2d 249 (9th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 535, 30 L.Ed.2d 543 (1971), a Superior Court medical examiner was held entitled to the immunity. And while none of the cases[1] on this subject

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1. Other cases allowing quasi-judicial immunity for official duties which are not strictly judicial include: Imbler v. Pachtman, 424 U.S. 409, 430, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128, 143 (1976) (prosecutor in initiating a prosecution and presenting the government's case);

deals with actions under section 794, they all deal with civil rights type actions, mostly under section 1983. We see no reason to distinguish actions under section 794 from other civil rights actions for immunity purposes. See New York State Association for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979). We hold, therefore, that the remaining individual defendants are entitled to quasi-judicial immunity from damages, both as to the section 1983 and the section 794 causes of action. For this reason, we affirm the trial court's denial of damages.

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1. (cont'd)
Johnson v. Reagan, 524 F.2d 1123, 1124 (9th Cir. 1975) (legislators); Bershad v. Wood, 290 Fj.2d 714, 716 (9th Cir. 1961) (Internal Revenue Service agents in levying on plaintiff's bank deposit); Dieu v. Norton, 411 F.2d 761, 763 (7th Cir. 1969) (court clerk and court reporter); Pope v. Chew, 521 F.2d 400, 405 (4th Cir. 1975) (parole board members submitting parole and pardon recommendations.

II. MOOTNESS

We also affirm the lower court's holding that all requests for injunctive relief are moot except for the one asking that appellants be placed immediately on a jury list. According to Franks v. Bowman Transport Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), "[t]he only constitutional mootness question is whether 'a live controversy [remains] at the time this court reviews the case.'" Id. at 755, 96 S.Ct. at 1260, 47 L.Ed.2d at 456 (quoting Sosna v. Iowa, 419 U.S. 393, 402, 95 S.Ct. 553, 559, 42 L.Ed.2d 532, 542 (1975)). This being the standard, the trial court's holding on mootness is, with the one exception mentioned, correct.

Our affirmance of the district court's holding that these injunctive claims are moot is buttressed by the district court's finding that "[t]he defendants have demonstrated complete willingness to apply the change in

California law." In situations where defendants voluntarily comply with a plaintiff's request, a claim will generally be considered moot if there is no legitimate concern that the defendant will return to his old ways, and if interim relief or events have completely and irrevocably eradicated the effect of the alleged violation. County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642, 649 (1979). The burden of demonstrating mootness is a heavy one, id. at 631, 99 S.Ct. at 1383, 59 L.Ed.2d at 649, but here, as in Davis, the burden is met.

The record clearly shows the good faith in which appellees have always acted and continue to act in enforcing the new statute and policy. There can be no legitimate concern that appellees will reinstitute the policy of excluding the blind from juries. Further, the jury questionnaires have been

changed, the blind are encouraged to serve, and all other effects of the past exclusion for which appellants request injunctive relief, with the exception of one, have been eradicated and are moot. The only viable claim for injunctive relief, therefore, is the request that all those previously excluded from service due to blindness be placed immediately on a jury list.

III. IMMEDIATE PLACEMENT ON A JURY LIST

Although it did not reach the question of whether the exclusion of blind persons from jury duty violated appellants' rights under the United States Constitution, the trial court denied the request for injunctive relief wich would immediately place appellants on a jury list. The court held only that the remedy requested was unavailable because it would interfere with the rights of California litigants to a randomly selected jury. We now reverse that denial by adopting the Fifth

Circuit rule that it is improper for a court to find first that there is no available equitable relief and then to refuse to consider the substance of a party's constitutional claim. The trial court must first decide whether or not there is a constitutional right, and only then consider the question of the appropriate equitable remedy, if any. Ciudadanos Unidos de San Juan v. Hidalgo County, 622 F.2d 807, 826-29 (5th Cir. 1980), cert. denied, 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981). We express no view on whether the injunction requested would interfere with any policy or mandate of randomness in jury selection, whether, if it does, that policy or mandate must bow to constitutional concerns, or whether some other equitable relief short of that requested by appellants would be appropriate. Rather, because the trial court acted improperly in not deciding the constitutional issue, we must

reverse its denial of relief and remand the decision of that issue.

Our holding here only applies to situations where the court attempts to fashion or denies equitable relief before the substantive right has been considered. In other words, unless equitable relief is absolutely barred, a court must consider the merits of a constitutional claim before deciding which equitable remedy is appropriate, if any, and then fashioning that relief.

On the other hand, if some remedy is barred absolutely, the court need not consider the substantive claim before denying that relief. Here, we have affirmed the denial of damages without considering the substantive right because damages are absolutely barred by appellees' quasi-judicial immunity. And since a finding of mootness bars a court from considering the claim, our affirmance of the

dismissal on mootness grounds of certain requests for injunctive relief is consistent with the rule we adopt. Mootness is not merely a matter of fashioning equitable relief, it is a bar to any relief and so may be considered before the right. Moot cases are beyond the federal judicial power under the Article III "Cases and Controversies" limitation. California v. San Pablo & T. R. Co., 149 U.S. 308, 311-14, 13 S.Ct. 876, 878, 37 L.Ed. 747, 748-49 (1893); C. Wright, Law of Federal Courts, section 12 at 39 & n.7 (3d ed. 1976).

Since the trial court's randomness concerns, however, were only a policy consideration in attempting to fashion equitable relief, and not an absolute bar to relief, our rule prevents bypassing a consideration of the allegedly violated constitutional right insofar as the request for immediate placement on a jury is

concerned.

IV. ATTORNEY'S FEES

On remand, the trial court must also reconsider its disposition of appellants' request for attorney's fees. Appellants claim attorney's fees under 29 U.S.C. section 794a (Supp. II 1978) and 42 U.S.C.A. section 1988 (1981). Under both statutes, plaintiff may only be awarded fees if he is a "prevailing party." To interpret section 794a, we must look to cases under section 1988, since there is a dearth of authority on the former statute. United Handicapped Federation v. Andre, 622 F.jd 342 (8th Cir. 1980). It is cases under section 1988, therefore, interpreting the meaning of "prevailing parties," which define the term for both statutes.

The lower court denied attorney's fees, saying that appellants were not "prevailing parties." The court found that "[t]he

elimination of the blind disqualification was passed entirely independently of the legislation." The court also found that all of appellees' actions, in regard to the new legislation, the jury questionnaires, the waiver of claims and other changes designed to facilitate the inclusion of the blind on juries were independent of appellajnts' lawsuit. The lower court stated that the lawsuit "did absolutely nothing to change the attitude of the County of Los Angeles, or the State of California with reference to the blind."

Although the trial court was correct in denying attorney's fees, we hold that its decision must be reconsidered now in order to determine if appellants are "prevailing parties" after the remanded issue has been decided.[2]

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2. The trial court, in reconsidering the

V. SUMMARY

In summary, we affirm the denial of damages as well as the denial of all injunctive relief except for the request that the individual appellants immediately be placed on a jury list. The denial of this last request for relief is reversed

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2. (cont'd)
attorney's fees issue, may wish to note the following: The court in American Constitutional Party v. Munro, 650 F.2d 184 (9th Cir. 1981), held that in order for there to be a "prevailing party," there must be a causal relationship between the litigation brought and the practical outcome realized. The former must be a material factor in bringing about the latter. Id. at 187. In addition, although the plaintiff need not win formal relief, the suit must cause a significant or important change in order for the plaintiff to be a "prevailing party." S.Rep.No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad.News 5912 (fees especially appropriate where party prevails on an important matter in the litigation); Manhart v. City of Los Angeles Department of Water & Power, 652 F.2d 904, 906-07 (9th Cir. 1981) (plaintiff must prevail on a significant issue).

and the issue is remanded for reconsideration of the merits of appellants' constitutional claim before the trial court approaches the question of possible relief. Although the trial court correctly denied attorney's fees given its disposition of the other issues, the attorney's fees issue must also be reconsidered on remand after the injunction claim has been considered in order to see if appellants are "prevailing parties" within the meaning of 29 U.S.C. section 794a and 42 U.S.C. section 1988.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX H.

Memorandum Decision

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants.

No. CV 77-3085 AWT

Filed March 3, 1983.

I. SCOPE OF THE MANDATE

After the grant of summary judgment in defendants' favor, the Court of Appeals in Pomerantz v. County of Los Angeles, 674 F.2d 1288 (9th Cir. 1982) ("Pomerantz"), affirmed in part and reversed and remanded in part. It is apparent from a review of the Court's opinion in Pomerantz that the remand is a narrow one, involving only the issue of the right to injunctive relief for immediate placement on a jury list (and reconsideration of the attorney's fee issue in the light of disposition of that claim on remand). Not

as apparent, however, is the precise scope of the remand. Before I can perform my duty of carrying out the Ninth Circuit's mandate, I must determine what it is. I turn now to the essential threshold task of making that determination.

First, it must be remembered that the plaintiffs are three blind individuals and an organization for the blind, the National Federation of the Blind of California (the "Federation"). Second, although this action was commenced as a putative plaintiffs' class action, no class was certified, no issue respecting that aspect of the case was raised on appeal and the Ninth Circuit's mandate neither orders certification nor consideration of possible certification of a class. In that context, the following language, which could be construed as affecting the scope of the remand, appears at four different places in the Ninth Circuit's opinion:

1. "The district court's denial of an injunction for immediate placement on a jury list, however, is reversed and remanded for further consideration."

674 F.2d at 1290. If this is the mandate, it may properly be construed as leaving open for decision by the district court the object of the injunction, i.e., in whose favor it is to run.

2. "We also affirm the lower court's holding that all requests for injunctive relief are moot except for the one asking that appellants be placed immediately on a jury list."

674 F.2d at 1291 (emphasis added). This wording, again if it is the mandate, limits the possible object of the injunction to "appellants." Appellants, of course, include the Federation and if an injunction were to issue in the latter's favor, other issues would have to be addressed because the Federation itself is not eligible for jury duty.

3. The only viable claim for injunctive relief, therefore, is the request that all those previously excluded from service due to blindness be placed immediately on a jury list."

674 F.2d at 1292 (emphasis added). This phrase connotes class-wide relief, although no class has been certified and failure to certify was not found by the Ninth Circuit to be error.

4. "In summary, we affirm . . . the denial of all injunctive relief except for the request that the individual appellants immediately be placed on a jury list."

674 F.2d at 1293 (emphasis added). This language clearly limits the trial court's consideration of the possible object of an injunction to only those appellants who could possibly be eligible for placement on a jury list, i.e., "the individual appellants." (I hereafter refer to each of the foregoing quotations from Pomerantz as an "Expression.")

Expression 3 would be the broadest

possible mandate. However, for the reasons stated below, in addition to the fact that failure to certify a plaintiffs' class was not raised on appeal (at least it is not addressed in Pomerantz), I conclude that it was not intended by the Ninth Circuit to be its mandate. Expression 3 immediately precedes Part III of Pomerantz, which is addressed to this Couirt's error in denying "the request for injunctive relief which would immediately place appellants on a jury list." 674 F.jd at 1292 (emphasis added). "Appellants" in this context must mean individual appellants because the Federation could never be placed on a jury list. It is not and never could become eligible for jury service. The error addressed was the error "to refuse a party's constitutional claim," because of a determination that no equitable relief was available. 674 F.2d at 1292. Because no class had been certified, "all those

previously excluded" were not and are not parties to this action. Therefore, it could not have been error to refuse to consider the potential constitutional claim of the putative, non-certified class. Moreover, a fair reading of the balance of Pomerantz discloses that the basic class claim for prospective relief has been mooted by state legislation which removed the root cause of the problem.

I conclude, therefore, that Expression 3 was not intended by the Ninth Circuit to be its mandate.

For the same reasons as set forth above, I also conclude that "appellants" in Expression 2 was intended to mean individual appellants only. While it is possible that by use of the term "appellants" the Ninth Circuit intended to include eligible members of the Federation (i.e., those blind members of the Federation who had been summoned for jury duty

within three years of the filing of the complaint and had been classified as not competent), there is no showing in the record that the Federation has any such members. (The allegation in the Second Amended Complaint, Paragraph 5, of the Federation's standing is made on information and belief. The question of that appellant's standing is addressed below.) Because of that deficiency in the record, I conclude that if the Ninth Circuit intended its mandate to include consideration of the constitutional claims of any such possible eligible member of the Federation, the problem would have been addressed more directly and explicitly.

For the above reasons, I conclude that the term "appellants" in Expression 2 refers only to those appellants who have, on the record before the Circuit, demonstrated standing to assert a constitutional claim for equitable relief, i.e., individual appellants

only.

This leaves, then, only Expressions 1 and 4. Expression 1 is not inconsistent with Expression 4, the latter is only a more specific mandate of the general expression of the former. In the context of the lengthy proceedings had to date, the record in this case and the standing problem of the Federation, I conclude that Expression 4 is the mandate of the Ninth Circuit directed to this Court. It is also to be preferred because it is the most specific, comes at the end of the opinion, is consistent with my interpretation of Expression 2 and is the most sensible.

If Expression 1 were intended to be the mandate and if this Court were free to determine the scope of remand on the issue of the possible object of any injunction, the result would be the same. First, as discussed above, non-certification of the putative class

was not held to be error. Second, even under a broad reading of the Second Amended Complaint, injunctive relief for immediate placement on a jury list is requested only for those blind persons summoned for jury duty between August 16, 1974 and August 16, 1977, and classified as "not competent" solely because of blindness. Nothing in the record here (and, perforce, nothing that could have been in the record on appeal) establishes that any such persons are members of the Federation. Therefore, nothing in the record supports consideration on remand of this possible injunctive relief for either a putative class or members of the Federation. There is no showing that any party, other than individual appellants, has or had a constitutional claim.

The mandate, therefore, is to determine whether "the individual appellants immediately [should] be placed on a jury

list." 674 F.2d at 1293. With regard to that claim, "The trial court must first decide whether or not there is a constitutional right, and only then consider the question of the appropriate equitable remedy, if any." 674 F.2d at 1292. There is, however, another threshold inquiry which must be made first.

II. MOOTNESS

As was true when the case was on appeal, so must it also be true on remand that, "[t]he only constitutional mootness question is whether 'a live controversy [remains] at the time this court . . '" decides the case on remand. 674 F.jd at 1291 (brackets in the original). I turn now to mootness.

Because mootness implicates the "case or controversy" requirement of Article III, as stated in Pomerantz, 674 F.2d at 1292, the issue persists to final disposition. Cf. Grunenthal GmbH v. Hotz, 511 F. Supp. 582, 585 n.3 (C.D. Cal. 1981) (under Rule 12(h)(3),

Fed.R.Civ.P., subject matter jurisdiction remains under continual scrutiny). For this reason, upon the filing and spreading of the mandate of the Court of Appeals, the parties were ordered first to make their respective factual showings on mootness, i.e., whether a live controversy remained. (The parties had agreed that the remaining issue on remand was ripe for disposition on cross-motions for summary judgment.)

There are now uncontroverted facts in the record that:

(1) Plaintiff Pomerantz served as a juror (called for jury duty and empanelled) in June or July, 1982.

(2) Plaintiff Soucy served as a juror for a period of 10 days, commencing on January 8, 1980.

(3) Plaintiffs Pomerantz and Soucy, since the date of their exclusion, have been placed on jury lists. This necessarily

follows as an uncontroverted fact from (1) and (2), above, because, in order to serve as a juror, a person's name must be on a jury list from which the names of jurors are drawn.

(4) Plaintiff Hayner was placed on a jury list, i.e., the "Qualified Master List" of potential jurors in September, 1982. This uncontroverted fact follows as an inference from the fact that a Bertram D. Hayner was selected at random for the Qualified Master List, said fact has not been controverted, and, despite the court's order of November 29, 1982, plaintiffs' declaration on mootness, filed on December 21, 1982, is absolutely silent with respect to the current status of plaintiff Bert Hayner. At oral argument, plaintiffs' counsel "accepted" defendants' representation of Hayner's jury status.

From the foregoing uncontroverted facts, it appears that this action has become moot with respect to the narrow issue on remand.

However, before proceeding to that discussion, it is necessary to note one further passage from Pomerantz. The Ninth Circuit noted that "one named appellant, Ms. Soucy, had already served on a jury as of January 28, 1980." 674 F.2d at 1290. Does this statement mean that the Ninth Circuit held, as law of the case, that events subsequent to the entry of summary judgment on December 13, 1979, did not render moot the issues raised by the error in this Court's judgment? I conclude that the answer must be in the negative.

First, Ms. Soucy's subsequent service as a juror is merely noted in the introductory portion of the opinion as a "demonstration" of the fact that the case has now become otherwise moot, that "a blind person now has the same chance of serving as anyone else." 674 F.2d at 1290. More importantly, it is clear from a close reading of Pomerantz that the Court's holding of error by this Court was

predicated on the factual circumstances before the district court at the time the earlier judgment was rendered.

"Rather, because the trial court acted improperly in not deciding the constitutional issue, we must reverse its denial of relief and remand the decision of that issue." 674 F.2d at 1292. The Court made clear that its holding was addressed to the procedure adopted by this Court, on the record then before this Court, of considering remedy before consideration of the merits of a constitutional claim, "unless equitable relief is absolutely barred." Id. The Ninth Circuit's holding squarely rests on the state of the record before this Court at the time judgment was entered. That record contains no suggestion of mootness of the remanded issue. And there is no discussion in the opinion of whether events subsequent to entry of judgment may have rendered the "immediate placement"

issue moot. The court reiterates the well-established mootness doctrine:

> "[A] finding of mootness bars a court from considering the claim . . . . Mootness is not merely a matter of fashioning equitable relief, it is a bar to any relief and so may be considered before the right. Moot cases are beyond the federal judicial power under the Article III 'Cases and Controversies' limitation. [Citations omitted.]

674 F.2d at 1292. The passage which immediately follows makes clear that the Court's holding was based on the state of the record before the district court and not on any subsequent events:

> "Since the trial court's randomness concerns, however, were only a policy consideration in attempting to fashion equitable relief, and not an absolute bar to relief, our rule prevents bypassing a consideration of the allegedly violated constitutional right insofar as the request for immediate placement on a jury is concerned."

Id. Based upon the foregoing discussion, I find no basis in the opinion to conclude

that the passing reference to Ms. Soucy's jury service was intended to hold, or even to suggest, that events subsequent to the rendition of this Court's earlier judgment did not render the remanded issue moot. Moreover, that reference was only to one of the three individual appellants and there is not even a suggestion that a "live issue" did not remain with respect to the remaining two individual appellants.

In County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), relied on in Pomerantz, 674 F.2d at 1291, the requirements for invocation of the doctrine are stated as follows:

> "[J]urisdiction, properly acquired, may abate if the case becomes moot because
>
> "(1) It can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, see id., [United States v. W. T. Grant Co., 345 U.S.] at 633; see also SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972), and

"(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. See e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973).

"When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law."

Because of the holding in Pomerantz that all other aspects of this case have been rendered moot, based primarily on the passage of remedial state legislation in 1977, the first part of the Davis test is indisputably met in this case. The issue then is whether or not "interim . . . events have completely and irrevocably eradicated the effects of the alleged violation," id., insofar as the individual appellants are concerned. With respect to them, the relief sought is that, "The defendants shall be required to make immediately available for jury duty plaintiffs Mitchell Pomerantz, Maureen Soucy, and Bert

Hayner." (Second Amended Complaint, p. 13, lines 12-14.) This remedy is to restore to individual plaintiffs the alleged right of which they were deprived, i.e., not to have been disqualified from jury service after having been called and declared "not competent" due solely to blindness. Since judgment was originally rendered in this case, all three plaintiffs' names have been placed on jury lists and two have actually served as jurors. Thus, individual plailntiffs have already obtained everything they are entitled to seek on remand. The effects of the alleged violation have been "irrevocably eradicated." Id. The sought one-time placement on a jury list was to remedy a past, allegedly wrongful disqualification after having been called. That already having been accomplished, plaintiffs have been restored to their pre-alleged-violation condition and, as respects any further jury service, must take

their chance of random selection as any other citizen.

Since no remedy remains within the scope of the mandate which could possibly be granted to individual plaintiffs, "the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." Davis, supra. 440 U.S. at 631. All that remains is the hypothetical question of whether individual plaintiffs' constitutional rights were violated.

There being no live controversy remaining, the action must be dismissed as moot.

Plaintiffs contend that this case may be saved from mootness by the Court's granting "late certification to prevent mootness." They rely for this proposition on Milonas v. Williams, 691 F.2d 931, 936-37 (10th Cir. (1982). However, as noted above, late class certification is not within the narrow scope

of the remand. Even if late certification were open here and a proper motion made indicating that the requirements of Rule 23, Fed.R.Civ.P., can currently be met, the Milonas exception would not apply here. One of the requirements for late certification of a class on a "relation back" basis to prevent mootness is that "the claim on its merits is 'capable of repetition, yet evading review.'" Id. at 937 (citation omitted). Such is not the case here. Pomerantz directly holds that, "There can be no legitimate concern that appellees will reinstate the policy of excluding the blind from juries." 674 F.2d at 1292. Thus, this is not a proper case to apply the doctrine of late certification to prevent mootness.

III. ASSOCIATIONAL STANDING

In the event I am mistaken in my determination of the scope of the mandate, one further issue should be addressed. If the

Ninth Circuit intended its mandate to include consideration of possible relief for the Federation, its standing must be assessed. Again, this is an issue which was not addressed on appeal and does not appear to be foreclosed.

As mentioned, the allegation which would support the Federation's standing with respect to the issue on remand is made on information and belief. (Second Amended Complaint, section 5, p. 4, line 25 to p. 5, line 3.) Never, during the five and one-half years that this case has been pending, has the Federation made any factual showing of its associational standing. Even after order of this Court on November 29, 1982, that the parties make their factual showing on mootness by December 20, 1982, the Federation has completely failed to show its standing on remand. Counsel was specifically asked at oral argument, on February 28, 1983,

whether he could name a single, current member of the Federation who: (a) was summoned for jury service between August 16, 1974 and August 16, 1977; (b) was declared to be "not competent" solely because of blindness; (c) has not subsequently been placed on a jury list; and (d) is currently otherwise qualified for jury service (e.g., resides in Los Angeles County). Plaintiffs' counsel stated that he had no such information; no such member could be identified. Plaintiffs further concede that standing is a question of law. (Pltfs.' Reply, p.4, lines 5-6, filed on Feb. 18, 1983.)

In order for an organization to have standing to sue it must have members who themselves suffered the injury to be redressed. Black Faculty Ass'n v. San Diego Community College Dist., 664 F.2d 1153, 1156-57 (9th Cir. 1981). Here, after invitation and opportunity, no such showing

has been made. Neither does it appear that the Federation has suffered any injury, within the scope of remand, in its own right. Id. Certainly, it is not, itself, eligible for jury duty.

Because the standing requirement also implicates the "case or controversy" requirement of Article III, Id. at 1155, were the mandate to be construed as requiring consideration of possible "immediate placement on a jury list" relief for the Federation, I, alternatively, dismiss this action, on remand, as against the Federation for lack of Article III standing.

IV. ATTORNEY'S FEES

Although holding that this Court's prior order denying attorney's fees was correct, the Ninth Circuit ordered reconsideration of that decision "in order to determine if appellants are 'prevailing parties' after the remanded issue has been decided." 674 F.2d at 1293.

When a case has otherwise become moot, a claim for attorney's fees does not preserve the case. However, the ancillary question of attorney's fees survives independently and the Court retains jurisdiction to determine whether plaintiffs are "prevailing parties" under 42 U.S.C. § 1988. (No attorney's fee issue under 29 U.S.C. section 794a is before the Court, because the only issue on remand is the constitutional, and not statutory claim.) This determination, however, is to be made on te record as it exists, i.e., there is no right to have a hypothetical question determined solely to ascertain whether plaintiffs would have prevailed if the case had not become moot. See United States v. Ford, 650 F.2d 1141, 1143-44 & n. 1 (9th Cir. 1981) (determination of right to attorney's fees under section 1988 when case becomes moot on appeal).

As is true with the other facets of this

case, mootness of the "immediate placement" issue came about due to the change in the law and was "independent of appellants' lawsuit." 674 F.2d at 1293. There was no "causal relationship between the litigation brought and the practical outcome realized." Id. at 1293 n.2.

For the foregoing reasons, the case on remand requiring dismissal because of mootness and lack of standing, I determine that plaintiffs are not "prevailing parties" under 42 U.S.C. section 1988 and, therefore, are not entitled to attorney's fees.

The issues have been tendered for decision on cross-motions for summary judgment. However, since both mootness and standing go to subject matter jurisdiction, an order of dismissal will be entered pursuant to Rule 12(h)(3), Fed. JR. Civ. P., rather than summary judgment.

Dated: Mar 3 - 1983.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX I.

Order of Dismissal

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants, No. CV 77-3085 AWT

Filed March 3, 1983.

Entered March 4, 1983.

In accordance with the Memorandum Decision signed and filed concurrently herewith,

IT IS ORDERED:

1. That the action is dismissed for mootness.

2. In the alternative, that the claim of plaintiff National Federation of the Blind of California is dismissed for lack of standing to sue.

3. Defendants shall recover their costs

of suit against plaintiffs in the sum of

$_____.

Dated: Mar 3 - 1984.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX J.

Order on Motion to

Modify Judgment

United States District Court

Central District of California

Mitchell Pomerantz, et al., Plaintiffs, v. County of Los Angeles, et al., Defendants.

No. CV 77-3085 AWT

Filed March 31, 1983

Entered April 4, 1983.

Plaintiffs have made a timely motion under Rule 59(e), Fed. R. Civ. P., to alter or amend a portion of the Court's Memorandum Decision, filed in support of its judgment. The Court has reviewed the papers filed in support of and in opposition to the motion and has concluded that the motion may be determined without oral argument. Rule 78, Fed. R. Civ. P., Local Rule 3.11.

Plaintiffs move for the modification of Part III which held, in the alternative, that the association plaintiff lacked standing to prosecute this action on remand. For the reasons hereinafter stated, the motion will be denied.

First, because the mandate of the Court of Appeals has been construed as applying only to the individual plaintiffs, no change in the judgment would result.

Second, the cases relied on by plaintiffs, commencing with the seminal case of Conley v. Gibson, 355 U.S. 41 (1971), are inapposite. All of those cases address the standard under Rule 12(b)(6), Red. R. Civ. P., on stating a claim and the likelihood of proving any "set of facts" entitling plaintiff to relief. Part III deals with the standing requirement of subject matter jurisdiction and not whether a claim is stated.

Finally, even now, the Federation does

not assert that it has standing. It only contends that if given extensive discovery it might be able to prove standing. Literally, millions of jury questionnaires would have to be examined to determine whether or not the Federation has standing. While it is true that defendants objected to "producing" the over 1,900,000 juror questionnaires for the three-year period in question, defendants agreed to permit their inspection by plaintiffs. This apparently never has been done. Having had and declined the opportunity to pursue discovery to ascertain its own standing, the Federation cannot now be heard to complain that this jurisdictional issue is decided on the record as it stands today. There is no harshness or inequity in requiring a party to pursue with diligence the issue of its own standing to sue.

On the state of the record today, there is not a single person to whom the Ninth

Circuit's mandate arguably could apply and the Federation has not named a single member who arguably could give it associational standing.

The motion is DENIED, as is defendants' request for sanctions.

Dated: Mar. 31, 1983.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX K.

Order

United States Court of Appeals

For the Ninth Circuit

Mitchell Pomerantz, et al., Plaintiffs-Appellants, vs. County of Los Angeles, et al., Defendants-Appellees. No. 83-5831 D.C. No. 77-3085

Filed Feb. 10, 1984

Before: GOODWIN, NELSON and REINHARDT, Circuit Judges.

Upon due consideration, this case is dismissed as moot for the reasons stated in the memorandum disposition of Judge A. Wallace Tashima, dated March 3, 1983.

APPENDIX L.

Order

United States Court of Appeals

For the Ninth Circuit

Mitchell Pomerantz, et al., Plaintiffs-Appellants, vs. County of Los Angeles, Defendants-Appellees. No. 83-5831 D.C. No. 77-3085

Filed May 14, 1984

Before: GOODWIN, NELSON and REINHARDT, Circuit Judges.

The panel as constituted in the above case, Judges Goodwin, Nelson and Reinhardt, have voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no judge of the court has requested a vote on

the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

APPENDIX M.

Constitutional Provisions

And Rules Involved

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty or property without due process of law. . ."

2. Rule 34(a) of the Rules of Appellate Procedure provides:

> "Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria

shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or
(2) the dispositive issue or set of issues has been recently authoritatively decided; or
(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."

3. Rule 3(a) of the Rules of United States Court of Appeals for the Ninth Circuit provides:

"Pursuant to Rule 34(a), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which a three judge panel of this court is of the unanimous opinion that:

(1) the appeal is frivolous; or
(2) the dispositive issue or set of issues has been recently authoritatively decided; or
(3) the facts and legal arguments are adequately presented in the briefs and rcord and the decisional process would not be significantly aided by oral argument.

Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed.

When a case has been classified by the court for submission without oral argument, the clerk shall give the parties notice in writing of such action. The parties shallhave senven dys from the date of the clerk's letter in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard."